83-1257

No. .....

In The

Supreme Court of the United States

OCTOBER TERM, 1983

SAFEWAY STORES, INCORPORATED,

Petitioner,

V.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AND TEAMSTERS LOCAL 745

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether an employer and the Equal Employment Opportunity Commission (EEOC), after a finding by the Commission of probable cause to believe that Title VII has been violated, may make a conciliation agreement granting rightful place seniority to victims of discrimination without the consent of the union representing the employer's employees or the joinder of the union in an adjudication of the merits of the discrimination claims.

PARTIES TO PROCEEDING

Safeway Stores, Incorporated; Teamsters Local 745; Equal Employment Opportunity Commission.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the District Court is reported at 560 F.Supp. 77 (N.D.Tex. 1981), and appears in the appendix at pages B-1 to B-12. The opinion of the Court of Appeals is reported at 714 F.2d 567 (5th Cir. 1983) and appears in the appendix at pages A-1 to A-26. The decision of the Court of Appeals denying a petition for rehearing en banc is unreported and appears in the appendix at page D-1.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1983. A timely petition for rehearing en banc was denied on October 31, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq.*, which is appended hereto.

STATEMENT OF THE CASE

This case arose out of four charges of discrimination filed with the EEOC against Petitioner. One charge alleged refusal to transfer or promote on account of race; two charges alleged a refusal to hire on account of national origin; and one charge alleged a refusal to hire because of race. The EEOC found merit to all of the charges and entered into conciliation negotiations with Petitioner. These negotiations led to the execution of conciliation agreements which required Petitioner to assign seniority dates to the charging parties reflecting the dates that the charging parties either initially sought a transfer or applied for employment. These seniority dates antedated the seniority

dates each charging party would have been assigned under Petitioner's collective bargaining agreement with Teamsters Local 745. The conciliation agreements further provided for an award of back pay to the charging parties. The Teamsters refused to participate in the conciliation negotiations or to become a party to the conciliation agreements.

Each of the conciliation agreements contained a statement that its execution did not constitute an admission by Petitioner of any violation of Title VII of the Civil Rights Act of 1964, as amended. When the assignment of rightful place seniority became known to members of the bargaining unit, numerous grievances were filed, the charging parties became victims of personal abuse, and Petitioner was threatened with economic retaliation. Because of these factors, Petitioner withdrew the rightful place seniority dates initially assigned the charging parties and assigned them seniority dates consistent with the collective bargaining agreement.

Addendum agreements between Petitioner, the EEOC and the charging parties were then entered into in which the charging parties accepted the collective bargaining agreement seniority dates in exchange for Petitioner's pledge to protect them for two years from economic loss in the event of a layoff. At the expiration of the addenda, three of the charging parties filed new charges of discrimination with the EEOC, seeking assignment of the original rightful place seniority dates pursuant to the conciliation agreements. The EEOC commenced the instant litigation seeking enforcement of the conciliation agreements, when Petitioner refused to grant this request. The EEOC joined the Teamsters as an indispensable party to the litigation. The District Court assumed jurisdiction pursuant to 42 U.S.C. § 2000e-

5(f)(3); 28 U.S.C. § 1377; 28 U.S.C. § 1343(4); and 28 U.S.C. § 1345.

The EEOC maintained before the District Court that it should enforce the conciliation agreements and award rightful place seniority. By contrast, the Teamsters maintained that an award of rightful place seniority was inappropriate unless Petitioner first litigated the underlying charges of discrimination. On March 31, 1982, the District Court found that Petitioner had fully performed under the addenda to the conciliation agreements; that Petitioner breached the conciliation agreements; and that the EEOC failed to establish a *prima facie* case of discrimination. Despite the failure of the EEOC to establish that Petitioner violated Title VII, the District Court enforced the conciliation agreements. The District Court rejected the Teamsters' contention that rightful place seniority was inappropriate absent a judicial finding of discrimination.

Petitioner and the Teamsters appealed the judgment of the District Court. The Court of Appeals affirmed that part of the judgment of the trial court enforcing the conciliation agreements against Petitioner with respect to the award of back pay. The Court of Appeals reversed, however, that part of the judgment requiring the assignment of rightful place seniority dates. The Court of Appeals found that an award of rightful place seniority, as provided for in the conciliation agreements, violated the seniority provisions of the collective bargaining agreement. The Court of Appeals held, therefore, that rightful place seniority is an inappropriate remedy absent the union's consent or participation in a judicial determination that Petitioner violated Title VII. Petitioner's request for a rehearing *en banc* was denied.

REASONS FOR GRANTING THE WRIT

This case presents an issue of national importance in the administration of Title VII of the Civil Rights Act of 1964, as amended, which has not been decided by this Court. That issue is whether an employer and the EEOC, after a finding of probable cause by the Commission, may agree to rightful place seniority for a charging party denied employment, transfer, or promotion in violation of Title VII, without the consent of the union representing that employer's employees. Previous decisions of this Court and lower federal courts recognize the preferred role of conciliation in the administration of Title VII's mandate of equal employment opportunity; [1] equally acknowledged is the necessity of awarding rightful place seniority, where appropriate, to place a victim of discrimination in the position he would have enjoyed, but for the unlawful employment practice:

> "Adequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application. It can hardly be questioned that ordinarily such relief will be necessary to achieve the 'make-whole' purposes of the Act." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764-766 (1976).

No previous decision of this Court prohibits an employer and the EEOC from making an agreement to award rightful place seniority to an individual identified by the EEOC as a victim of discrimination in a probable cause determination. The conciliation procedure triggered by the probable cause

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[1] *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *United States v. City of Miami, Florida*, 664 F.2d 435 (5th Cir. 1982) (en banc) (per curiam).

finding can only be effective if make-whole relief can be administratively determined and granted. Victims of discrimination will demand, and employers should have the option of granting, that relief without the victim's being required to institute litigation to gain what this Court has said he is entitled to under Title VII. Requiring litigation of the issue in every instance merely delays — perhaps for years — resolution of a dispute that need not arise in the first instance if the employer and the EEOC are allowed to implement through conciliation what this Court has already declared to be an essential make-whole remedy.

The decision of the Court of Appeals precludes an employer and the EEOC from resolving a charge of discrimination resulting from a failure to hire, transfer or promote by holding that such relief is appropriate *only* if the union consents or there is a judicial determination of discrimination in a proceeding on the merits of the discrimination claim in which the union is allowed to participate:

> "... retroactive seniority cannot properly be granted in the absence of either the Union's consent or an adjudication, in which the Union has the opportunity to participate, on the merits of the discrimination claims." *EEOC v. Safeway Stores, Incorporated and Teamsters, Local 745*, 714 F.2d 567, 580 (5th Cir. 1983).

This decision, if allowed to stand, will make the award of rightful place seniority the exception rather than the rule in the administration of Title VII, for it will force victims of discrimination to seek complete relief *only* in a Federal District Court and *only* in a proceeding in which *both* the employer and the union are parties. Moreover, by holding that a Federal District Court may not award rightful place seniority to a victim of discrimination *unless* the union is made a party to the Title VII suit on its merits, the Court

of Appeals clearly ignores decisions of this Court and other courts holding that the only process which may be due the union (in the context of a judicial resolution of claims) is the opportunity to appear and state its objections to the award of rightful place seniority. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Moore v. City of San Jose*, 615 F.2d 1265 (9th Cir. 1980); *Airline Steward and Stewardesses Association v. American Airlines*, 573 F.2d 960, 964 (7th Cir), *cert. denied*, 439 U.S. 876 (1978). A writ of certiorari should issue to the Court of Appeals to correct this error which will require victims of discrimination to sue both employers and unions to obtain make-whole relief.

A subsidiary question presented by this Petition is whether a union is denied due process of law by the execution of the conciliation agreements in the circumstances presented by this case. The Court of Appeals concluded that its approval of the conciliation agreements between the employer and the EEOC awarding rightful place seniority to a victim of discrimination would lead to the adoption of a rule "... which recognized gradations in the rights of a [third] party to due process." *EEOC v. Safeway Stores, Incorporated, supra*, 714 F.2d at 578. Guidance is needed from this Court as to whether notice to the union and an opportunity to be heard are essential to the resolution of the issues presented by this case, and, if so, have been satisfied. Issues and considerations which should be addressed in briefs and argument to this Court include whether the invitation issued by the EEOC is a sufficient notice and opportunity to be heard, whether the union's refusal to participate constitutes a waiver of any process which is due, whether an award of rightful place seniority constitutes an alteration of the collective bargaining agreement, the nature of the employer's wrong, the union's

knowledge of the employer's conduct, the right of the victim to prompt make-whole relief, the delay occasioned by requiring a judicial resolution of the claims and the nature of the union's objection and concern. A writ of certiorari to the Court of Appeals should issue so that this Court might resolve these concerns.

The reliance of the Court of Appeals on this Court's recent decision in *W. R. Grace & Company v. Local 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, ——U.S.——, 76 L.Ed. 2d 298 (1983) is misplaced. In *W. R. Grace*, the company and the EEOC had agreed to change the order of employees to be laid off from that required by the collective bargaining agreement with the union. This Court held that such a change altered the collective bargaining agreement, and that this alteration could not be accomplished without the union's consent or a judicial determination of the appropriateness of the remedy. *W. R. Grace* does not hold that an award of rightful place seniority in a conciliation agreement constitutes an alteration of a collective bargaining agreement.

No decision of this Court has ever addressed the right of an employer and the EEOC *after* a determination of probable cause to agree to award the victim rightful place seniority as part of the relief granted through the process of conciliation. This question should be decided by this Court to instruct employers, unions and the EEOC as to whether make-whole relief may be accomplished administratively, or whether it must be determined judicially.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Allen Butler, one of the attorneys for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of ....., 1984, I served the requisite number of copies of the foregoing Petition for Writ of Certiorari on all parties required to be served, by depositing same in the United States mail, first class, postage prepaid, at their respective post office addresses:

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Allen Butler

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellee,

v.

SAFEWAY STORES, INCORPORATED and Teamsters Local 745, Defendants-Appellants.

No. 82-1266.

United States Court of Appeals, Fifth Circuit.

Sept. 16, 1983.

Equal Employment Opportunity Commission brought suit seeking specific performance of conciliation agreement entered into between defendant employer and itself to resolve for charges of employment discrimination. The United States District Court for the Northern District of Texas, 560 F.Supp. 77, Robert W. Porter, J., awarded enforcement of the agreement, and appeals were taken. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) federal jurisdiction existed to enforce Title VII conciliation agreements; (2) finding that addendum agreement was not intended permanently to replace obligations in original conciliation agreement under which employer promised to give each charging employee a seniority date retroactive either to date he applied for employment or to first date that someone was hired by employer following his application was not clearly erroneous; thus, once employer refused to award retroactive seniority at end of two-year period, court was correct in finding that a breach had occurred; and (3) retroactive award of seniority dates called for in Title VII conciliation agreement violated terms of collective bargaining contract between union and employer and such retroactive seniority could not properly be granted in absence of either union's consent or an adjudication, in which union would

have opportunity to participate, on the merits of discrimination claims.

Affirmed in part, reversed in part.

1. Federal Courts — 221

Federal jurisdiction existed to enforce Title VII conciliation agreement. Civil Rights Act of 1964, § 706(f), as amended, 42 U.S.C.A. § 2000e-5(f) (3).

2. Civil Rights — 32(2)

Title VII empowers EEOC to enforce conciliation agreements in federal court. Civil Rights Act of 1964, § 706(f), as amended, 42 U.S.C.A. § 2000e-5(f) (3).

3. Specific Performance — 62

So long as regular contract rules are satisfied and so long as enforcement of a conciliation agreement does not conflict with parties' individual rights or the purposes of Title VII, the conciliation agreement is specifically enforceable in absence of an independent finding that the employer did in fact engage in discriminatory practices. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

4. Civil Rights — 32(2)
Constitutional Law — 318(2)

In entering into Title VII conciliation agreement, in which employer expressly did not concede a violation of Title VII, employer relinquished its right to litigate the issue of discrimination in exchange for assurance that it had avoided the consequences which would be imposed by a judicial finding of discrimination and failure of district court to make findings on underlying claim did not deprive employer of its due process rights to litigate the allegations of discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; U.S.C.A. Const.Amend. 5.

5. Compromise and Settlement — 20(1)

Finding that addendum agreement, under which charging employees agreed to retain their preconciliation agreement seniority dates in exchange for employer's promise to protect them form economic harm if they were laid off because of these seniority dates, was not intended permanently to replace obligations in original conciliation agreement under which employer promised to give each charging employee a seniority date retroactive either to date he applied for employment or to first date that someone was hired by employer following his application was not clearly erroneous; thus, once employer refused to award retroactive seniority at end of two-year period, court was correct in finding that a breach had occurred. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

6. Civil Rights — 46

Retroactive award of seniority dates called for in Title VII conciliation agreement violated terms of collective bargaining contract between union and employer and such retroactive seniority could not properly be granted in absence of either union's consent or an adjudication, in which union would have opportunity to participate, on the merits of discrimination claims. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

7. Civil Rights — 46

Even if union could be characterized as a prevailing defendant in action seeking enforcement of Title VII conciliation agreement which employer was found to have breached, trial court's denial of attorney fees to union was proper and not an abuse of discretion where EEOC was entirely proper in assuming that union, if not joined in the action, might interfere with court's enforcement of the agreement and where there was no demonstrable evidence of bad faith on Commission's part in bringing suit, nor were its legal theories so empty and frivolous as to imply a vexatious motive. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

8. Civil Rights — 46

An award of attorney fees to a prevailing party in an action under Title VII is a matter committed to discretion of district court. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

9. Civil Rights — 46

While a prevailing plaintiff usually recovers attorney fees under Title VII, a prevailing defendant can recover such fees only if the claim against it was without foundation, unreasonable, frivolous, meritless or vexatious. Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C.A. § 2000e-5(k).

Appeals from the United States District Court for the Northern District of Texas.

Before INGRAHAM, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge.

This action was brought by the Equal Employment Opportunity Commission (EEOC) seeking specific performance of three conciliation agreements entered into between defendant Safeway Stores, Inc. and the EEOC to resolve four charges of employment discrimination filed against Safeway.[1] Willis Taylor filed a charge of discrimination on April 10, 1972, alleging that Safeway's failure to transfer him or promote him to a truck driver position was because of his race. Fernando Cantu and Concepcion Rodriguez filed charges on January 10, 1974, alleging that Safeway refused to hire them for positions in its warehouse

[1]The EEOC is the federal agency charged with enforcement of the antidiscrimination provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq., and it often proceeds on the basis of complaints filed by individuals who claim to have been the victims of prohibited discrimination on the basis of race, religion, sex or national origin. 42 U.S.C. § 2000e-2(a).

due to their national origin. Billy Faison filed his charge of discrimination on August 9, 1975, alleging that Safeway failed to hire him as a truck driver on account of his race.

Following investigation on all four charges, the EEOC found reasonable cause to believe that the allegations were true. Pursuant to Section 706(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b), the EEOC then attempted conciliation with Safeway with respect to the charges. In June and August of 1976, a conciliation agreement was reached, signed by the EEOC, Safeway, and the charging parties. While there were technically three agreements, we treat them as one overall agreement.[2] According to the conciliation agreement, Safeway promised to give each employee a seniority date retroactive either to the date he applied for employment or to the first date that someone was hired by Safeway following his application. Safeway also agreed to pay each employee a specific sum which represented the amount he would have earned had he been hired on the earlier date. In exchange for these provisions each charging party and the EEOC agreed not to sue Safeway on the underlying charge, subject to the performance by Safeway of the promises in the agreement. The conciliation agreement also included a provision stating that it did not constitute an admission by Safeway that a violation of Title VII had taken place. The conciliation agreement did not have any specific duration.

At all times relevant to this action, Teamsters Local 745 (the Union) was the collective bargaining representative for Safeway employees in the truck driver and warehouseman job classifications related to the claims made by Taylor, Faison, Rodriguez and Cantu. The Union was not a party to the conciliation agreement, despite a request by the EEOC that it participate in the conciliation process. The Union refused to sign the agreement, and consistently op-

[2]The charges of Rodriguez and Cantu were resolved by a single conciliation agreement. There are, therefore, only three conciliation agreements involved in this action.

posed the award of retroactive seniority to the charging parties.

On September 9, several months after signing the conciliation agreement, Safeway reneged on its initial instructions to revise the seniority rosters in accordance with the conciliation agreement and reassigned a later date to each employee, corresponding to the date each was hired or promoted.[3] Following Safeway's refusal to enforce the retroactive seniority dates provided in the conciliation agreement, the charging parties again complained to the EEOC. Subsequently, the EEOC and Safeway entered into an addendum to the conciliation agreement regarding Faison, Rodriguez and Cantu.[4] The addendum stated that each charging party would retain his preconciliation seniority date, and in exchange, that Safeway would protect him from economic loss in the event he was laid off due to the use of the less advantageous seniority date. The term of the addendum agreement was two years.

Safeway performed its obligations under the addendum during the two years of its existence, but refused to give the charging parties their retroactive seniority when the addendum expired. On February 1, 1978, the EEOC filed suit against Safeway, alleging that Safeway had breached the conciliation agreement by failing to assign the employees the seniority dates provided for in the agreement. The EEOC's complaint asked that the conciliation agreement be specifically enforced and that Safeway and the Union be enjoined from refusing to comply with its terms.[5]

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[3] *See infra* note 20.

[4] Safeway and the EEOC did not agree upon a similar addendum to the Taylor conciliation agreement.

[5] Teamsters Local 745 was poined as a defendant pursuant to Fed. R.Civ.P. 19(a)(2) which authorized the EEOC to join the union because the union "claims an interest relating to the subject of the action."

Testimony at trial indicated that Safeway did not carry out the conciliation agreement because of threats received from employees and union members. The company's employment relations manager testified that the charging parties had reported verbal abuse, and he also testified that there had been reports of several incidents of harassment by coworkers and union members, including the slashing of car tires. The manager also stated that several drivers in the trucking department had threatened not to bid on runs if the charging parties receive retroactive seniority.

EEOC officials who participated in negotiating the agreement testified that the purpose of the addendum had been to give Safeway additional time to resolve its problems with the employees and the Union, while simultaneously protecting the charging parties from economic harm. Safeway and the Union contended that Safeway's performance under the two-year addendum agreement fulfilled its obligations to the three employees. In April 1982, the district court issued its judgment in favor of the EEOC, specifically enforcing the conciliation agreement and awarding backpay to the EEOC on behalf of Taylor, Faison, Rodriguez and Cantu.[4] No judgment was granted with respect to the Teamsters. Safeway and the Teamsters appeal.

I. SAFEWAY'S CLAIMS

A. *Jurisdiction*

[1] A preliminary consideration is whether the district court, 560 F.Supp. 77, was correct in concluding that it had jurisdiction over this action. The court held that its jurisdiction was established by Section 706(f)(3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(3), which provides in part that "[e]ach United States district court and each United States court of a place

[4] Taylor was awarded $1,750, Faison $15,000, Cantu $2,500, and Rodriguez $4,400.

subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter."[7]

Safeway contends that subject matter jurisdiction over the suit exists only in state court. This argument is based on its assertion that Title VII neither expressly authorizes the EEOC to sue on a contract, nor impliedly authorizes the action under § 2000e(f)(1) which provides for a civil action by the EEOC if the agency is "unable to secure from the respondent a conciliation agreement acceptable to the Commission." Additionally, because Title VII does not compel employers to reach conciliation agreements, Safeway argues that subject matter jurisdiction does not flow indirectly from Title VII through 28 U.S.C. §§ 1331(a) or 1337.

We note initially that no federal court has refused jurisdiction over actions to enforce or interpret. Title VII conciliation agreements.[8] Several courts have presumed that federal jurisdiction is available without expressly considering the issue. *See Brito v. Zia Co.*, 478 F.2d 1200 (10th Cir. 1973) (nominal damages awarded individual plaintiff for breach of conciliation agreement without discussion of jurisdictional issue); *Southbridge Plastics Division, W. R. Grace & Co. v. Local 759, International Union of United Rubber, Cork, Linoleum and Plastic Workers of America*, 565 F.2d 913 (5th Cir. 1978) (jurisdiction to consider the effects of conciliation agreements upon collective bargaining agreement assumed); *EEOC v. St. Louis Labor Health Institute*, 17 FEP Cases 250 (E.D.Mo.1978) (jurisdiction to enforce conciliation agree-

[7]The court also found that jurisdiction would be proper under 28 U.S.C. § 1337 (actions arising under Acts of Congress regulating commerce), 28 U.S.C. § 1343(4) (actions to recover damages or secure equitable relief under Acts of Congress providing for the protection of civil rights), and 28 U.S.C. § 1345 (civil actions commenced by an agency of the United States).

[8]The district court in *Equal Employment Opportunity Commission v. Liberty Trucking Co.*, 528 F.Supp. 610 (W.D.Wis.1981) dismissed a case seeking enforcement of a conciliation agreement for lack of subject matter jurisdiction. This holding, however, was reversed by the Seventh Circuit. *See infra* slip op. pp. 7237-7238, pp. .....

ment assumed without discussion). Several other courts have found jurisdiction, albeit without extensive discussion of the issue. *See EEOC v. Contour Chair Lounge Co.*, 596 F.2d 809 (8th Cir. 1979) (jurisdiction to enforce the conciliation agreement imposing a quota provision assumed under 42 U.S.C. §§ 2000e et seq.). *EEOC v. Mississippi Baptist Hospital*, 12 FEP Cases 411 (S.D.Miss.1976) (jurisdiction to enforce conciliation agreements available under § 2000e-5(f)(3), 28 U.S.C. §§ 1337 and 1343(4) because conciliation agreement would otherwise be rendered meaningless); *Jersey Central Power & Light Co. v. Local Unions 327, 749, 1289, 1298, 1303, 1309 and 1314 of International Brotherhood of Electrical Workers*, 508 F.2d 687 (3d Cir. 1975), *vacated and remanded on other grounds*, 425 U.S. 987, 96 S.Ct. 2196, 48 L.Ed.2d 812 (1976) (federal jurisdiction to consider effect of conciliation agreement upon collective bargaining exists under 28 U.S.C. § 1331).

While the reasoning of these cases underlying the acceptance of federal jurisdiction is admittedly less than comprehensive, we are convinced that federal courts have jurisdiction over suits to enforce Title VII conciliation agreements. Although Title VII does not explicitly provide the EEOC with the authority to seek enforcement of conciliation agreements in federal court, it would be antithetical to Congress' strong commitment to the conciliatory process if there were no federal forum in which the EEOC could enforce such agreements. "Cooperation and voluntary compliance were selected [by Congress] as the preferred means" of accomplishing its goal of eliminating employment discrimination. *United States v. City of Miami*, 664 F.2d 435, 442 (5th Cir.1981) (en banc) (*quoting Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147 (1974)). To this end, Congress created the EEOC and established an administrative structure whereby the agency "would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit." *Alexander v. Gardner-Denver Co., supra*, 415 U.S. at 44, 94 S.Ct. at 1017. Indeed,

the EEOC is expressly prohibited from commencing legal action until it has attempted to negotiate voluntary compliance. 42 U.S.C. § 2000e-5(f)(1); *EEOC v. Klingler Electric Corp.*, 636 F.2d 104, 107 (5th Cir.1981); *EEOC v. Pet, Inc.*, 612 F.2d 1001, 1002 (5th Cir.1980). In view of this federal policy requiring employment discrimination claims to be investigated by the EEOC and, whenever possible, administratively resolved, it would be at war with the statutory scheme to conclude that Congress did not intend to permit enforcement of these voluntary agreements in federal courts.

The one court to undertake a detailed analysis of the federal jurisdiction question agrees with our conclusion. In *EEOC v. Liberty Trucking Co.*, 695 F.2d 1038 (7th Cir.1982) a conciliation agreement was negotiated between the EEOC and the defendant employee following charges by the employee that he had been fired from his job because he was a Seventh Day Adventist. Liberty Trucking breached the conciliation agreement after six months, and further attempts by the EEOC to resolve the matter were unsuccessful. The EEOC then filed an action in district court seeking enforcement of the agreement. The district court found that the employer deliberately violated the conciliation agreement, but it dismissd the action for lack of subject matter jurisdiction. *See EEOC v. Liberty Trucking Co.*, 528 F.Supp. 610 (W.D.Wis.1981). The court adopted the identical argument advanced by Safeway in the immediate case. It ruled that an EEOC action to enforce the conciliation agreement is an action on a contract, that Title VII does not expressly or by implication authorize the EEOC to sue on a contract, and therefore only the general law of contracts can serve as the source of the agency's authorization to sue. It concluded that suit must be brought in state court. *Id.* at 614.

On appeal, the Seventh Circuit reversed, holding that a suit brought by the EEOC seeking enforcement of a conciliation agreement is one brought directly under Title VII and thus the federal courts have jurisdiction pursuant to

§ 2000e-5(f)(3).[9] The Seventh Circuit's decision, as is ours, was predicated upon the primacy of conciliation to the Title VII statutory scheme. As the court explained, "[r]esolution of complaints of employment discrimination through conciliation agreements and avoiding resort to litigation has consistently been the primary means through which the EEOC vindicates rights secured by Title VII." 695 F.2d at 1042. The court went on to conclude that state court enforcement would be both "problematic" and "uncertain", so that the ultimate result of denying federal jurisdiction would be to make conciliation a much less attractive means by which to resolve employment discrimination grievances.[10]

We are not prepared to agree with the Seventh Circuit that state court enforcement of conciliation agreements would necessarily create difficulties or that state courts might be hostile to such agreements. State courts have proved their ability to enforce federal statutes; for example, in suits brought under the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. We do agree, however, that it would be illogical to conclude that Congress intended exclusive state jurisdiction, that there be *no* federal jurisdiction to consider or enforce the voluntary agreements it designated as the primary means of accomplishing its goal of eliminating

[9]The court declined to decide whether jurisdiction would have been proper under either 28 U.S.C. §§ 1345 or 1331.

[10]The Seventh Circuit stressed the difficulties which would result from enforcement of conciliation agreements in state court. Because suits to enforce these agreements inevitably involve interpretation of Title VII, the court evaluating them must determine basic questions of whether and under what conditions such agreements are possible. The court reasoned that it was therefore critical that construction and application of these agreements, entered into by a federal agency and designed to protect federally created statutory rights, be according to uniform standards and not subject "to the variance and uncertainty of 50 different state court interpretations." Additionally, the court concluded that if state courts were the initial forum in these cases, the duty of insuring uniform construction in application of thousands of yearly conciliation agreement contracts would fall to the Supreme Court, and that state courts may well be hostile to specific performance clauses in employment contracts.

employment discrimination. We hold, therefore, that federal jurisdiction to enforce conciliation agreements exists directly under Title VII by means of 42 U.S.C. § 2000e-5(f)(3).[11] We agree with the court below that the usefulness of conciliation agreements as vehicles for voluntary resolution of employment discrimination charges would be "significantly reduced" if the agreements were not enforceable in the forum which is most familiar with Title VII litigation.

B. *Enforcement of the Conciliation Agreement*

[2] 1. Safeway asserts that even if jurisdiction is proper, Title VII does not empower the EEOC to enforce conciliation agreements in federal court. Rather, the EEOC is empowered only to litigation allegations of "unlawful employment practices" as defined by Title VII in § 2000e-5(g). Because nowhere in the statute is there language making breach of conciliation agreements an "unlawful employment practice" which would warrant instigation of litigation by the EEOC, Safeway contends that the EEOC's only recourse for an employer's breach of such an agreement is to sue to establish the underlying charge of discrimination. In essence, therefore, Safeway is asking this court to hold that the promises made to the EEOC in a conciliation agreement are without legal effect and can be violated with impunity.

As explained in the preceding section, conciliation is central to the statutory scheme of Title VII. If conciliation agreements were unenforceable, there is little question that this primary role of voluntary compliance would be undermined. Were we to accept Safeway's position, an employer would be free to enter into a conciliation agreement, bide its time for so long as it benefited from doing so, and then breach the agreement with no fear of sanction. The

[11]Because we hold that jurisdiction exists under this section, we find it unnecessary to decide the applicability of the alternative bases for federal court jurisdiction advanced by the EEOC and considered by the district court, see n. 7, *supra*.

employer would have lost nothing. It would then face only the same prospect of suit on the underlying discrimination charge it would have faced prior to its entering the conciliation agreement. The EEOC and the aggrieved employees, on the other hand, would have suffered serious prejudice. The suit would be possible only after the Commission learned an employer or a union would not fulfill its obligations. Suit undertaking to prove discrimination would have been substantially delayed. Such delay would potentially result in difficulty in proving violations of the Act. Witnesses might no longer be available, memories would have faded, and crucial documents might not have been preserved. Conciliation, instead of being a means of enforcing the law, could well become a dilatory tactic which could be used to make enforcement of Title VII less effective.[12]

Were we to rule that the federal courts were unable to enforce these agreements, we would undermine the very foundation upon which the conciliation process, the "most important function of the EEOC," rests. If agreements between an employer or union and the Commission voluntary to comply with measures to eliminate discrimination in employment could be abrogated with impunity, there would be no rational reason for the EEOC to enter into such agreements. The Commission would have no guarantee that its bargained-for concessions would result in *solutions* to the alleged discriminatory practices. Rather, the EEOC would be in a position where it was compelled, by statute, to engage in the process of "conference, conciliation and persuasion" where that process would likely delay resolu-

[12]This case provides a good example of the delay which could be produced by a recalcitrant employer (or union) if there were no way to enforce the conciliation agreements. Here the EEOC found cause on the charges in late 1975 and early 1976. When Safeway claimed union interruption of its efforts to effectuate the agreements, the agency signed an addendum agreement which gave Safeway a two year additional period. Safeway's intent to breach did not become apparent until the expiration of this period. Thus, the effect of signing a conciliation agreement would have been to delay an enforcement suit by over three years.

tion of its claim and actually prejudice the aggrieved employees the agency represents.

In conclusion, therefore, the same rationale which convinced us that the federal courts have jurisdiction to consider conciliation agreements between employers, employees, and the EEOC compels us to hold that these courts have the power to enforce such agreements. As the court said in *George Banta Co. v. NLRB*, 604 F.2d 830, 838 (4th Cir. 1979), *cert. denied*, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980), upholding the enforcement of settlements under the NLRA: "To permit a party to accept the benefits of a settlement agreement, and then withdraw from that agreement without complying with its corresponding obligations, would subvert the settlement process." Nothing compelled Safeway to reach this agreement. The company was free to refuse the EEOC's attempts at compromise and take its chances in a Title VII lawsuit. Having agreed to provide relief to the charging parties, however, Safeway is obligated to perform its promise.[13]

[3] 2. Safeway additionally argues that, even if the conciliation agreement is subject to specific enforcement, the district court cannot order compliance until it has made findings that the company did in fact engage in discriminatory practices. Safeway contends that ordering "Title VII remedies" such as backpay and retroactive seniority, in the absence of such an independent finding of discrimination, would transform the EEOC's determination of "probable cause" into a "binding adjudication" of a Title VII violation.

A finding of discrimination by the court as a condition precedent for any award of relief under Title VII is required, of course, in an ordinary enforcement action brought under

[13]This obligation on Safeway or any employer is, of course, restricted by the necessity that the promises contained in the conciliation agreement not conflict with the statutory provisions of Title VII or the constitutional rights of the parties involved. *See infra* slip op. pp. 7242-7246, pp. .....

the statute.[14] In the immediate case, however, the district court was not ordering relief for a Title VII violation. Rather, it was enforcing an agreement voluntarily entered into by the parties pursuant to Section 706(b) of the statute. Thus, the only restrictions upon the court's authority to require that the parties fulfill their obligations under the conciliation agreement are those derived from the agreement itself and the principles of contract law. So long as regular contract rules are satisfied and so long as enforcement of the agreement does not conflict with the parties' individual rights or the purposes of Title VII, the contract is specifically enforceable. *See Fulgence v. J. Ray McDermott*, 662 F.2d 1207 (5th Cir.1981).

This conclusion has been assumed by courts enforcing conciliation agreements. *See Southbridge Plastics Division, W. R. Grace & Co. v. Local 759, Intl. Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, 565 F.2d 913 (5th Cir.1978); *EEOC v. Contour Chair Lounge Co.*, 596 F.2d 809 (8th Cir.1979).[15] The district court was not giving disproportionate weight to the findings of the EEOC because it was merely enforcing an agreement made voluntarily by Safeway.

[4] 3. Finally, Safeway urges that it reserved the right to contest the charges of discrimination by virtue of a clause

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[14]At trial on a Title VII claim of discrimination, the EEOC's findings, although entitled to weight, are not dispositive. *EEOC v. Contour Chair Lounge Co.*, 596 F.2d 809, 813 (8th Cir. 1979).

[15]Safeway argues that, in *Southbridge Plastics*, this Court "intimated" that the district court should not enforce an EEOC conciliation agreement unless it independently determined that an unlawful employment practice had been committed. The section of that opinion cited by Safeway in support of this argument, however, does not relate to the enforceability of conciliation agreements in general, but only to those situations where the agreement has violated the terms of a union's collective bargaining agreement and the EEOC is undertaking to enforce the agreement against the non-signing union, as in the case *sub judice*. Whether a trial *de novo* is required where the agreement violates collective bargaining terms is separate issue which is the focus of our discussion in Section II.

in the conciliation agreement in which the company expressly did not concede violation of Title VII.[16] Safeway points to this clause as evidence of its right in the present case to contest guilt of discriminatory practices. We have construed similar provisions in consent decrees as barring the necessity for litigation of allegations of discrimination in later enforcement proceedings, except as to future suits seeking additional relief. *United States v. City of Alexandria*, 614 F.2d 1358, 1365 n. 15 (5th Cir.1980). Although Safeway vigorously argues that a conciliation agreement differs from a consent decree and therefore case law interpreting one cannot be applied to the other, it does not articulate any reason why any differences should justify differing interpretations of such a clause. In both the conciliation agreements and in consent decrees, the defendant employer relinquishes its right to litigate the issue of discrimination in exchange for the assurance that it has avoided the consequences which would be imposed by a judicial finding of discrimination. An employer in either situation cannot accept the benefits of its bargain and ignore its corresponding obligation.

We also reject Safeway's contention that the failure of the district court to make findings on the underlying claim deprived it of its due process right to litigate the allegations of discrimination. Under the EEOC's conciliation procedure an employer is notified of the allegations against it and the Commission's subsequent finding. When it then voluntarily signs a conciliation agreement and is afforded a trial on the issue of whether it breached that agreement, the employer has clearly received all the process that is due.

We summarize our holdings as to Safeway's claims: We find that a district court can order that a party perform the promises it made in a conciliation agreement without an

[16]The relevant provision in the agreement read: "[i]t is understood that this agreement does not constitute an admission by [the company] of any violation of Title VII of the Civil Rights Act of 1964, as amended."

independent determination that discriminatory practices have, in fact, occurred. It would be manifestly illogical to recognize that Congress had selected conciliation as the primary means of achieving compliance with the Act, and at the same time to interpret the statute so that employers and unions are free to breach such agreements with impunity. If a trial *de novo* or a finding on the merits were required before any voluntary agreement to resolve discrimination claims could be enforced, conciliation agreements would be rendered worthless as a means of securing compliance with Title VII.

C. *The Addendum Agreement*

[5] The district court found that Safeway had breached the conciliation agreement. In so ruling, the court determined that the addendum agreement, under which the charging employees agreed to retain their preconciliation agreement seniority dates in exchange for Safeway's promise to protect them from economic harm if they were laid off because of those seniority dates, was not intended permanently to replace the obligations in the original conciliation agreement. Rather, the district court found that the addendum was inended to "provide time for Safeway to negotiate with Local 745 and implement the agreed retroactive seniority dates at the end of the term of the addend[um] with the support of the union if possible." Safeway argues that this finding was clearly erroneous. Specifically, the company claims that it was excused from providing retroactive seniority to three of the charging parties[17] because it fulfilled its obligations under the addendum agreement. The company's position is that it agreed to protect the men from layoffs in exchange for their agreement to waive any claim to the seniority dates of the original conciliation agreements.

We must disagree. Considerable evidence was presented at trial concerning the negotiation between the parties which

[17]This argument does not apply to the claims of Willis Taylor because Taylor never signed the addendum agreement.

preceded the signing of the addendum.[18] Two commission officials who participated in the negotiation testified at trial that the discussions with Safeway officials focused on how to provide additional time in which Safeway could resolve its difficulties with the Union.[19] Safeway's employee relations director admitted that he never told the EEOC negotiators that Safeway intended for its obligations to end after expiration of the two year period. Also, the charging parties testified that their agreement to the addendum was based on their understanding that after the two year period they would receive their promised seniority dates. Moreover, there is no language in the addendum itself to indicate an intention to supersede the original agreement for a period longer than the two years specified.

In view of this evidence, we cannot hold as clearly erroneous the district court's finding that the addendum agreement was intended only to allow Safeway a two year grace period during which it could solve its problems with the Union. Once Safeway refused to award retroactive seniority at the end of that period, the court was correct in finding that a breach had occurred.

II. THE UNION'S CLAIMS

A. *The Conciliation Agreement and the Collective Bargaining Contract*

[6] The Union argues that the district court erred in ordering specific performance of the portion of the conciliation agreement which provided for retroactive seniority.

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[18]Use of such testimony does not violate the parol evidence rule, which prohibits use of extrinsic evidence to vary or contradict the terms of an integrated contract. The rule does not exclude evidence which would aid in interpreting the meaning of the contract. *Corbin on Contracts*, § 543 at 499, 516 (West 1952).

[19]The addendum provided that Safeway would protect the named employee from economic loss resulting from a layoff for a period of two years. It stated that Safeway's "inability to recognize the [earlier seniority] date for bidding purposes is based upon its reasonable fear of violence and threats of economic retaliation."

Specifically, the Union claims that assignment of a seniority date to the charging parties other than the date on which they were hired[20] violated the seniority provisions contained in the collective bargaining agreement between Safeway and the Union, and thus cannot be enforced in the absence of either the Union's consent or a judicial determination that the underlying charges of discrimination are true. The EEOC contends that the order to grant retroactive seniority was proper, and urges that we affirm the court's finding that the conciliation agreement at issue here did not interfere *per se* with the collective bargaining system, but rather "merely ... afforded [the charging parties] their rightful place as specified in the conciliation agreement."

In support of its argument the EEOC relies on several federal court decisions which hold that the award of "rightful place seniority" is a presumptively proper remedy in Title VII cases, and may only be withheld where it will have some unusually adverse impact on incumbent employees. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747, 771, 779 n. 41, 96 S.Ct. 1251, 1267, 1271 n. 41, 47 L.Ed.2d 444 (1976); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 347, 97 S.Ct. 1843, 1860, 52 L.Ed.2d 396 (1977). The Union does not dispute the firmly established proposition of *Franks* that an employee who is the victim of unlawful employment discrimination may be made whole by an award of retroactive seniority, even though such relief may violate seniority provisions contained in the collective bargaining agreement between the offering employer and a

[20]Faison's seniority date under the original conciliation agreement was April 8, 1975, the date he applied for the position of truck driver. Faison was hired on June 24, 1975. Rodriguez was assigned a seniority date of October 3, 1973, which was the date he applied for the position of warehouseman and order filler. Rodriguez was hired March 22, 1976. Cantu applied for the same position on November 5, 1973. He was assigned that date for seniority purposes, but was not hired until March 28, 1976. Taylor applied for a promotion to a truck driver position on April 7, 1972, and was promoted on August 4, 1974. He was assigned a seniority date of May 22, 1972, which corresponded with the date Safeway first promoted another employee to that position.

union. Rather, the Union contends that such relief cannot be ordered, over a union's objection, where the union has had no opportunity to participate in an adjudication that a Title VII violation has occurred.

We agree. In each of the cases cited by the EEOC, the unions involved were afforded the opportunity to participate in proceedings to determine the merits of discrimination charges, whether the charging parties were entitled to relief, and whether such relief should include an award which was contrary to the collective bargaining agreement. In those cases the issue of employment discrimination had been judicially resolved with the objecting union having been provided the opportunity to participate in those proceedings. Because of the *judicial* resolution of the discrimination, *Franks* and *Teamsters* permitted awards which departed from the union's collective bargaining agreement. Where, on the other hand, the district court has granted enforcement of an agreement which would infringe upon the rights of parties who did not participate in that agreement, and where there has never been a finding that discriminatory practices have occurred, the "presumption" in favor of retroactive seniority can no longer be assumed to take precedence over the rights of the non-consenting parties.

Two recent decisions of this Court have involved the circumstances under which a court may enforce a settlement or conciliation agreement which undertakes to affect a union's collective bargaining system in the absence of the union's consent. In *Southbridge Plastic Division, W. R. Grace & Co. v. Local 759, International Union of United Rubber, Cork, Linoleum and Plastic Workers of America*, 565 F.2d 913 (5th Cir.1978), the EEOC and the employer had entered into a conciliation agreement which provided that certain seniority provisions of the collective bargaining system would be superseded by a quota system. The union objected to enforcement of the conciliation agreement and sought arbitration, pursuant to a standard arbitration clause. The employer then brought an action under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, seeking a

declaratory judgment that the conciliation agreement overrode any contrary seniority provision contained in the collective bargaining agreement. The union counterclaimed, seeking arbitration.

The district court held that the agreement was binding on the union as well as the employer and that it took precedence over any conflicting provisions of the collective bargaining agreement. On appeal, we reversed. We held that Section 703(h) of Title VII protected the seniority provision of the collective bargaining agreement from attack in the absence of a showing that the union's seniority system was negotiated and maintained with the discriminatory purpose. *See United States v. International Brotherhood of Teamsters, supra*, 431 U.S. at 328 n. 30, 97 S.Ct. at 1851 n. 30. The Court explained that the terms and conditions of employment, such as seniority, which are agreed to by management and a union, can be overturned on a Title VII challenge "only to the limited extent necessary to comply with that statute." 565 F.2d at 916. Where there was no showing of any discriminatory purpose inherent in the seniority system, "wholesale destruction of this system, as authorized by the conciliation agreement, cannot be permitted." *Id.* at 916. The Court further explained that its ruling did not preclude an award of retroactive seniority to employees alleging employment discrimination so long as the employee sought such an adjudication "through the traditional Title VII route". *Id.* at 917.

Our other recent decision is *United States v. City of Miami*, 664 F.2d 435 (5th Cir.1981) (en banc). In that case, the United States and the City of Miami entered into a consent decree that made significant alterations and changes in a collective bargaining agreement which existed between the city and the defendant union.[21] The district court approved the decree over the objections of the union protesting the changes the decree made in its collective bargaining

[21]The decree created a quota system, changed the civil service testing and promotion system in the existing union contract, deferred pensions, and instituted an affirmative action plan.

agreement. Sitting *en banc*, we modified the decree by deleting from it those provisions which conflicted with the union's collective bargaining system. We acknowledged the importance of voluntary settlement to the goal of eliminating employment discrimination, but concluded that "a party potentially prejudiced by a decree has a right to a judicial determination of the merits of its objection. The party is prejudiced if the decree would alter its contractual rights ..." 664 F.2d at 447. We explained, as we had in *Southbridge*, that the contested relief could be awarded if the United States on remand proved that discrimination, "the necessary predicate for relief", had taken place. *Id.* at 448.

A recent decision of the Supreme Court, *W. R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, ——U.S.——, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983), further bolsters on reasoning in *Southbridge* and *City of Miami*. There the EEOC and employer had entered into a conciliation agreement which "nullified" the collective bargaining agreement seniority provisions. The union did not join in the conciliation process. The Supreme Court stated that "[a]bsent a judicial determination, the Commission, not to mention the Company, cannot alter the collective bargaining agreement without the Union's consent." The Court explained that to allow otherwise "would undermine the federal labor policy that parties to a collective bargaining agreement must have reasonable assurance that their contract will be honored." *Id.* (Citation omitted).

The EEOC attempts to distinguish this authority by arguing that the conciliation agreement at issue here does not result in the "wholesale destruction" of an existing collective bargaining agreement between an employer and its employees as did the agreements in *Southbridge* and *City of Miami*. Rather, in the instant case, the seniority system remains "entirely intact" with the charging parties being afforded "merely their rightful place" within that system. We must reject this argument. While the effect upon the collective bargaining system here may well be less

pronounced than that in the earlier cases, we cannot agree that a difference in the degree of conflict with the collective bargaining structure, beyond de minimus, can affect our ultimate decision. Were we to accept the Commission's argument, we would in essence adopt a rule which recognized gradations in the rights of a party to due process. Where a third party's rights are affected *a lot*, he would have a right to a judicial determination of the merits of his objections. But where a third party's rights are lesser affected, terms of an agreement between two other parties could be imposed upon him in spite of his objections and in the absence of an opportunity to state those objections in court.

We cannot countenance such a result. There is no question that awarding the charging parties a seniority date which is other than the date on which they began work displaces others on the seniority roster and constitutes a violation of the collective bargaining contract. Section Five of that contract clearly states that employees are assigned as their seniority dates the dates on which their employment in the classification commenced. As such, it cannot be imposed upon the employees of the company over the Union's protest without a trial on the merits.[22]

Nor is our opinion made doubtful by the EEOC's emphasis on the primacy of conciliation to the resolution of employment discrimination claims. We agree that conciliation is the preferred method of resolving Title VII claims. In fact, our analysis in Section I is predicated upon that recognition. And we are aware of the Commission's argument that a consequence of our holding today will be that a union has a "veto" over any portion of a conciliation agreement which violates its collective bargaining contract with an employer, potentially undermining the role of these voluntary agree-

[22]As the result of Safeway's assignment of retroactive seniority date to Rodriguez and Cantu, those men advanced ahead of approximately fifty other warehousemen employees to more favorable positions on the warehouseman seniority roster. Taylor advanced ahead of approximately 39 other truck drivers, and Faison ahead of approximately 29 truck drivers to a more favorable position in the trucking department seniority roster.

ments. If requiring that the EEOC and an employer must obtain a union's consent before "agreeing" to terms which impinge upon the union's collective bargaining agreement mitigates the Commission's ability to effectuate conciliation agreements, such a restriction upon the Commission's authority is required by law. While Title VII expresses an important national policy, it does not exist in a vacuum. The national labor policy strongly undergirds collective bargaining when the employees want it. National Labor Relations Act, 29 U.S.C. §§ 151 et seq. The terms and conditions of employment are to be shaped by the employer and the exclusive bargaining representatives of its employees when the employees elect to do so. The words of Judge Gee in his concurring opinion in *City of Miami* are appropriate:

> And while it is well and very well to extol the virtues of concluding Title VII litigation by consent, as do our brethren—a sentiment in which we concur—we think it quite another to approve ramming a settlement between two consenting parties down the throat of a third and protesting one, leaving it bound without trial to an agreement to which it did not subscribe. If this is permitted, gone is the protester's right to appear in court at a trial on the merits, present evidence, and contend that the decree proposed is generally infirm—as imposing unconstitutional or illegal exactions—so that it should not be entered *at all* or so as to bind *any* party or the affected third party. (Emphasis in original)

664 F.2d at 451.

We find that the district court erred in its conclusion that the award of retroactive seniority in this case had no legally significant impact on the collective bargaining agreement in existence between the company and the Union.[23] The right of the other employees to a position on the company's se-

[23]That the district court's conclusion was one of law is not disputed on appeal. As we explained in *City of Miami*, "[i]t is difficult to envision an issue more purely legal than that of whether one written agreement, the consent decree, conflicts with another written compact, the existing collective bargaining agreement." 664 F.2d at 451 n. 7.

niority roster which corresponded to the date they began work was infringed by the court's order, and therefore the Union had a right to a judicial determination of the merits of its objections. If the EEOC seeks a remedy which would infringe upon the rights of a third party, it cannot rely on its "agreement" with another party to do so. Rather it must demonstrate the propriety of such relief in a judicial proceeding at which the third party is allowed to present its evidence and voice its objection. Conciliation is, by its own terms, a voluntary process. The involved parties are free to agree, and conversely, free not to agree. If they choose to agree, then the goal of voluntary compliance has been achieved. If they choose not to agree, then "conciliation" cannot alter the terms of a collective agreement. To do so, there must be an adjudication that discrimination has occurred.

B. *Attorneys' Fees*

[7] The Union finally argues that the trial court erred in failing to award attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k). Specifically, it contends that because the district court did not find the Union responsible for the threats made to plaintiffs and to Safeway, and thus did not find it necessary to enjoin the Union from interfering with the enforcement of the conciliation agreements, the Union was entitled to attorneys' fees as the prevailing party in the action.

[8,9] We do not accept the Union's contention. Even were we to accept the Union's characterization of itself as the prevailing party, it is clear that an award of attorneys' fees to a prevailing party in an action under this subchapter is a matter committed to discretion of the district court. We overturn such a decision on review only if there is an abuse of that discretion. *Merriweather v. Hercules, Inc.*, 631 F.2d 1161 (5th Cir.1980). More important, while a prevailing plaintiff usually recovers fees under this section, a prevailing defendant can recover such fees only if the claim against it was "without foundation, unreasonable, frivolous, meritless or vexacious." *Crawford v. Western Electric Co.*, 614 F.2d 1300, 1321 (5th Cir. 1980); *Durant v. Owens-Illinois Glass*

Co., 656 F.2d 89 (5th Cir.1981; *Lopez v. Aransas County Independent School District*, 570 F.2d 541 (5th Cir.1978).

The district court recognized the possibility of Union opposition when it stated that, if it were later brought to the court's attention that the Union had interfered with implementation of its order, "such interference will be dealt with expeditiously and appropriately." The EEOC was entirely proper in assuming that the Union, if not joined in the action, might interfere with the court's enforcement of the agreements. Conversely, there was no demonstrable evidence of bad faith on the commission's part in bringing suit, nor were its legal theories so empty and frivolous as to imply a vexacious motive. Consequently, the district court's denial of attorneys' fees to the Union was proper and not an abuse of its discretion.

III. CONCLUSION

We find that jurisdiction exists in federal courts under 42 U.S.C. § 2000e-5(f)(3) over suits brought by the EEOC to enforce conciliation agreements. We also find that Title VII generally authorizes enforcement of those agreements by the federal courts without the need of an independent determination by the court on the underlying charge of discrimination. Enforcement of these agreements is not permissible, however, as to those who have not consented to their provisions and who are prejudiced by their terms. Because we find that the award of seniority dates called for in the conciliation agreement at issue violated the terms of the collective bargaining contract between the Union and Safeway, such retroactive seniority cannot properly be granted in the absence of either the Union's consent or an adjudication, in which the Union has the opportunity to participate, on the merits of the discrimination claims. The district court's decree establishing seniority dates differing from those provided for in the collective bargaining agreement cannot stand. Accordingly, those portions of the judgment which relate to the awarding of pre-hire seniority dates to the employee claimants are reversed. The court's award of backpay to each of the claimants is affirmed.

AFFIRMED IN PART, REVERSED IN PART.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EEOC
vs.
SAFEWAY STORES, INC.
vs.
TEAMSTERS LOCAL 745
Rule 19(a) (2)

No. CA3-78-0134-F

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action was brought by the EEOC in an effort to force compliance with conciliation agreements reached among the EEOC, four charging parties, and Safeway Stores, Inc. The Teamsters Local 745 was joined under Rule 19. Trial was had on February 17 and 18, 1982. The issue of damages was bifurcated at trial.

FACTS

1. Plaintiff, Equal Employment Opportunity Commission ("EEOC") is an agency of the United States Government charged with the administration and enforcement of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.

2. Defendant Safeway Stores, Incorporated ("Safeway") is a corporation incorporated in the State of Maryland and doing business in the State of Texas in the City of Dallas, where it is engaged in the grocery supply and retail busi-

ness. At all times material to the lawsuit, Safeway has continuously employed more than 15 employees.

3. Charging Party Willis W. Taylor is a black resident of the City of Dallas and State of Texas.

4. Charging Party Billy G. Faison is a black resident of the City of Dallas and the State of Texas.

5. Charging Party Concepcion C. Rodriguez is a person of Spanish-American extraction, and a resident of the City of Dallas and State of Texas.

6. Charging Party Fernando Cantu is a person of Spanish-American extraction, and a resident of the City of Dallas and State of Texas.

7. The Union is a labor organization as defined in Title VII of the Civil Rights Act of 1964, as amended, and in the Labor-Management Relations Act of 1947, 29 U.S.C. § 152(5). At all times material to this lawsuit, the Union has been the collective bargaining representative for the employees of Defendant Safeway Stores, Inc., in the truck-driver and warehouseman job classifications filled by Willis Taylor, Billy Faison, Concepcion Rodriquez, and Fernando Cantu.

8. Billy G. Faison applied for the position of truck driver on April 8, 1975. He was hired on June 24, 1975 and on August 9, 1975 filed a charge alleging discrimination on the part of Safeway Stores, Inc. based on race by failing to hire him to a truck driver's position. The EEOC investigated the charge and issued a Letter of Determination finding reasonable cause to believe the charge to be true. On August 23, 1976 Safeway, Faison and the EEOC entered into a conciliation agreement whereby Safeway agreed to assign Faison a seniority date of April 8, 1975, which is the date he applied for the position of truck driver. Safeway implemented Faison's new seniority date on August 26, 1976, but retracted it on September 9, 1976, allegedly in response to union threats. On January 3, 1977 EEOC, Faison and

Safeway entered into an addendum to the conciliation agreement which provided that the original seniority date of June 24, 1975 would be continued for two years and Safeway would have Faison from economic harm if a layoff occurred.

9. Concepcion Rodriguez applied for the position of warehouseman and order filler on October 3, 1973 and was hired on March 22, 1976. On January 10, 1974 he filed charges of discrimination with the EEOC against Safeway alleging that Safeway failed to hire him because of his national origin. The EEOC investigated the charge and issued a Letter of Determination finding reasonable cause to believe the charge to be true. On June 24, 1976 Safeway, Rodriguez and the EEOC entered into a conciliation agreement whereby Safeway agreed to assign Rodriguez a seniority date of October 3, 1973 which is the date he applied for the position of warehouseman and order filler. Safeway never implemented the agreed seniority date, allegedly in response to union threats. On December 20, 1976 the EEOC, Rodriguez and Safeway entered into an addendum to the conciliation agreement which provided that the original seniority date of March 22, 1976 would be continued for two years and in exchange Safeway would protect Rodriguez from economic harm if a layoff occurred.

10. Fernando Cantu applied for the position of warehouseman and order filler on November 5, 1973 and was hired on March 28, 1976. On January 10, 1974 he filed charges of discrimination with the EEOC against Safeway alleging that Safeway failed to hire him because of his national origin. The EEOC investigated the charge and issued a Letter of Determination finding reasonable cause to believe the charge to be true. On June 24, 1976 the EEOC, Cantu and Safeway entered into a conciliation agreement whereby Cantu was assigned a seniority date of November 5, 1973, which is the date he applied for the position of warehouseman and order filler. Safeway never implemented the agreed seniority date allegedly in response to union threats. On December 20, 1976 the EEOC, Cantu and Safeway entered into an addendum to the conciliation agreement which provided that the

original seniority date of March 28, 1976 would be continued for two years and in exchange Safeway would protect Cantu from economic harm if a layoff occurred.

11. Willis W. Taylor applied for a promotion to truck driver on April 7, 1972. He was promoted to that position on August 4, 1974. On April 1[illegible], 1972, he filed a charge of discrimination with the EEOC alleging that Safeway Stores, Inc. discriminated against him because of his race by failing to promote or transfer him to a truck driver position. The EEOC investigated the charge and issued a Letter of Determination finding reasonable cause to believe the charge to be true. Safeway, Taylor and the EEOC entered into a conciliation agreement whereby Safeway agreed to assign Taylor a seniority date of May 22, 1972 which corresponded to the first promotion to the position of truck driver after Taylor had applied for that promotion. Safeway implemented Taylor's new seniority date on August 26, 1976 but retracted it on September 9, 1976 allegedly in response to union threats. No addendum was executed as to Mr. Taylor.

12. In addition to providing retroactive seniority, each conciliation agreement contained the following general provisions:

> a. It is understood that this Agreement does not constitute an admission by the Respondent of any violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> • • • •
>
> c. The Commission hereby covenants not to sue the Respondent with respect to the matters covered by this Conciliation Agreement, subject to performance by the Respondent of the promises and representation contained herein."

No duration was specified for the agreement.

13. Each of the three addenda stated that the "term of this Addendum Agreement shall be for a period of two (2)

years following the date of its execution." Each provided that Safeway would protect the employee from economic loss for a period of two years, based on a guaranteed forty (40) hour work week. The employee agreed to accept his Company anniversary date as his seniority date for all purposes other than bidding purposes. The reason stated in the addenda for its execution was Safeway's "reasonable fear of violence and threats of economic retaliation communicated to it by officials of Local 745 . . .".

14. Teamsters Local 745 consistently took the position that Safeway could not unilaterally assign retroactive seniority dates to any employee for any reason.

15. Local 745 was requested to participate in the conciliation process, but declined to do so.

16. Teamsters Local 745 did not prevent the implementation of the conciliation agreements by threats or acts.

17. Agreement by the Union was not a condition precedent to the effectiveness of the conciliation agreements.

18. The purpose of the addenda was to provide Safeway additional time in which to attempt to secure union acquiescence to the conciliation agreements while at the same time providing he charging parties with protection from economic harm due to layoffs.

19. Safeway fully performed under the addenda.

20. Various threats were made to the charging parties by employees in connection with the retroactive seniority dates. There were minor incidents of violence. None of the threats or violence are legally attributable to the union.

21. Several grievances were filed with the union protesting the retroactive seniority awards but no action was taken on these grievances.

22. On January 10, 1978, Taylor filed a second charge of discrimination against Safeway with the EEOC alleging that

Safeway had failed or refused to abide by the seniority date agreed to in the conciliation agreement dated August 23, 1976.

23. On January 15, 1979, Faison filed a second charge of discrimination against Safeway with the EEOC, alleging that Safeway had refused or failed to abide by the seniority date agreed to in the Conciliation Agreement dated August 23, 1976.

24. On January 23, 1979, Rodriguez and Cantu each filed a second charge of discrimination against Safeway with the EEOC, alleging that Safeway had failed or refused to abide by the seniority date agreed to in their respective conciliation agreements dated June 24, 1976.

25. Safeway breached its conciliation agreement with Willis Taylor.

26. Safeway breached its conciliation agreement with Billy Faison.

27. Safeway breached its conciliation agreement with Concepcion Rodriguez.

28. Safeway breached its conciliation agreement with Fernando Cantu.

29. It was not legally impossible for Safeway to perform as agreed in the conciliation agreements.

30. The Addenda Agreements did not supersede permanently the conciliation agreements.

31. The EEOC did not put on a prima facie case of discrimination, but relied entirely on the enforceability of the conciliation agreements.

32. Every finding of fact deemed a conclusion of law is hereby adopted as such.

CONCLUSIONS OF LAW

THIS COURT HAS SUBJECT MATTER JURISDICTION

Plaintiff's amended complaint alleges jurisdiction pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343, and 1345, and 42 U.S.C. § 2000e-5(f) (1) and 5-(f) (3). Safeway contends that this Court has no jurisdiction to enforce a conciliation agreement because it is in essence an action on a contract and Title VII does not expressly authorize the EEOC to sue on a contract. Safeway further asserts that the statute does not implicitly authorize this action under Subsection 5(f) (1) which provides for a civil action by the EEOC if the EEOC is "unable to secure from the respondent a conciliation agreement acceptable to the Commission." Safeway argues that since none of the other provisions of Title VII expressly or implicitly authorize the EEOC to sue to enforce a conciliation agreement, only the law of contracts may serve as a source for this action. Safeway asserts that since Title VII does not compel employers to reach conciliation agreements, subject matter does not flow indirectly from Title VII through 28 U.S.C. §§ 1331(a) or 1337. In support of the foregoing assertions, Safeway refers this Court to *EEOC v. Liberty Trucking Co.*, ——F.Supp.——, 27 FEP Cases 815 (W. D. Wis. 1981).

The Supreme Court and the Fifth Circuit have extolled the virtues of voluntarly conciliation and settlement of Title VII claims. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36; (1974); *United States v. City of Miami, Florida* 664 F.2d 435 (5th Cir. 1981). In fact, parties have a right to come to an agreement. *U.S. v. City of Miami, supra*, at 440. The policy of encouraging voluntary resolution of employment discrimination claims would be significantly impeded by the inability of parties to reach binding, negotiated settlements whether before or after the filing of a suit. The usefulness of conciliation agreements as vehicles for voluntary resolution of employment discrimination charges would be significantly reduced if the agreements were not enforceable in the forum which is most familiar with Title VII litigation.

Therefore, I hold that this Court has jurisdiction under 42 U.S.C. § 2000e-5(f)(3) which provides: "Each United States district court... shall have jurisdiction of actions brought under [Title VII]." *EEOC v. Contour Chair Lounge Co.*, 596 F.2d 809 (8th Cir. 1979); *EEOC v. Mississippi Baptist Hospital* 12 FEP cases 411 (S.D. Miss. 1976); *Louis Labor Health Institute*, 17 FEP cases 250 (E.D. Mo. 1978).

Additionally, jurisdiction of this Court is founded on 28 U.S.C. § 1337 (actions arising under act Acts of Congress regulating commerce); 28 U.S.C. 1343(4) (actions to recover damages or to secure equitable relief under Acts of Congress providing for the protection of civil rights); and 28 U.S.C. 1345 (civil actions commenced by an agency of the United States.)

II. THE CONCILIATION AGREEMENTS ARE ENFORCEABLE

A conciliation agreement is specifically enforceable unless it contains provisions which are unreasonable, illegal, unconstitutional, or against public policy. I reach this conclusion through analogy to the standard of review set forth by the Fifth Circuit for consent decrees in *U.S. v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980). In each instance the parties have voluntarily reached an agreement. That one agreement was reached prior to the filing of suit while the other agreement was reached after the filing of a suit is irrelevant when reviewing the enforceability of the agreement.

The EEOC seeks to specifically enforce the provision of each conciliation agreement which confers on the charging party a retroactive seniority date. Retroactive seniority as a remedy in Title VII actions is not unreasonable, illegal, unconstitutional or against public policy. *Franks v. Bowman Transportation Co.*, 424 U.S. 747. In *Franks* the Supreme Court specifically held that retroactive seniority awards are an essential remedy in an effort to make whole a victim of

discrimination. *Franks* established a presumption in favor of retroactive seniority relief within the framework of Title VII, 427 U.S. 747 at 771.

Teamsters Local 745 asserts that the award of retroactive seniority in this case would violate the collective bargaining agreement. The Union asserts that Safeway may not enter into an agreement granting retroactive seniority, but must litigate the discrimination charges if retroactive seniority is involved. This is clearly incorrect. "There is no indication in the legislative materials that § 703(h) was intended to modify or restrict relief otherwise appropriate..." *Franks*, supra at 7612.

The Union's reliance on *U.S. v. City of Miami*, supra is misplaced. The challenged consent decree in that case changed the method by which promotion would be determined from test accomplishment, as provided in the collective bargaining agreement, to seniority in instances which involved the aggrieved class. *Miami*, supra at 446. In the instant case, the seniority system itself remains totally intact with the charging parties merely being afforded their rightful place as specified in the conciliation agreement.

III. FULL PERFORMANCE OF THE ADDENDA AGREEMENTS DOES NOT EXCUSE PERFORMANCE OF THE CONCILIATION AGREEMENTS

Three of the four charging parties, Cantu, Rodriquez, and Faison, entered into addenda to the conciliation agreements along with Safeway and EEOC. Safeway contends that the complete language in the addenda themselves which indicate the intentions of the parties to supersede or replace the conciliation agreement for any period beyond two years.

IV. IMPOSSIBILITY IS NOT A DEFENSE

Safeway contends it was impossible to perform under the conciliation agreements because to do so would have resulted in harm to the charging parties' persons and property by

employees who were union members, and would have resulted in severe economic loss to Safeway. Impossibility occurs where (1) an unexpected contingency occurs, (2) the risk of which was not allocated, and (3) such occurrence has made performance impossible. *Alabama Football, Inc. v. Wright, supra*, 452 F.Supp. at 185.

Impossibility is no defense in this case because Safeway's Employee Relations Manager, George Smith, testified that Safeway and the EEOC were both aware that the union had declined to enter into the conciliation negotiations and took the position that retroactive seniority would violate the collective bargaining agreement. The protestations of employees who had been senior to the charging parties and then became junior to the charging parties pursuant to the conciliation agreement could hardly be characterized as unexpected. Further, there was no evidence of official union actions designed to force Safeway to repudiate its agreement with the charging parties and the EEOC. The few isolated incidents of employees' protests related to the granting of retroactive seniority fails to rise to the level of making performance impossible.

V. ANY CONCLUSION OF LAW DEEMED A FINDING OF FACT IS HEREBY ADOPTER AS SUCH

CONCLUSION

Each conciliation agreement will be specifically enforced to provide each charging party with his respective retroactive seniority date. This Court has no evidence that Teamsters Local 745 will in any way interfere with the execution of this judgment and therefore no relief will performance under the respective addenda relieves the obligation to perform under the conciliation agreements. The EEOC and the charging parties contend that the addenda were merely a temporary change in the conciliation agreements and that following the expiration of the two year term

of the addenda, the conciliation agreements were again fully enforceable.

The conciliation agreements themselves contained no stated duration of the agreement. The addenda agreements were fully performed by Safeway. The pertinent terms of the addenda include: (1) Safeway would protect the employee-signatory from economic loss for a period of two years, based on a guaranteed 40-hour work week; (2) the employee-signatory would retain the date agreed to in the conciliation agreement for all purposes other than bidding; (3) for bidding purposes, the employee-signatory would retain his original seniority date.

This Court finds that the addenda were not intended by the parties to replace the conciliation agreements. The two year term of the addenda was derived from the experience of Safeway that after two years employment, lay-off is unlikely. The two year agreements were intended to provide time for Safeway to negotiate with Local 745 and implement the agreed retroactive seniority dates at the end of the term of the addenda with the support of the union if possible. The addenda were executed in late 1976 and early 1977. At this point in time Safeway's agreement to grant the following seniority dates had already been obtained in the conciliation agreements: (1) Faison, April 8, 1975; (2) Rodriquez, October 3, 1973; (3) Cantu, November 5, 1973. It is clear that enforcement of the conciliation agreements would provide adequate protection from layoff even without the benefit of the addenda. There is no credible evidence of consideration received by the charging parties to permanently forfeit the competitive benefits of the agreed to seniority dates in exchange for layoff protection for two years. There is no issue as regards the union at this time. However, should it be brought to this Court's attention that Local 745 does in fact interfere with the implementation of this Court's decision in any way, such interference will be dealt with expeditiously and appropriately.

Due to the inability of the EEOC's witness on the issue of damages to appear for continuation of her testimony, the issue of damages was reserved for hearing at a later date. Said hearing will be scheduled for April 19, 1982 at 3:30 p.m.

Signed and entered this ..... day of ....., 1982.

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1266

D. C. Docket No. CA-3-78-0134-F

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

versus

SAFEWAY STORES, INCORPORATED AND TEAMSTERS LOCAL 745,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

Before INGRAHAM, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part;

IT IS FURTHER ORDERED that the judgment rendered provides that costs be taxed equally against Equal Employment Opportunity Commission and Safeway Stores, Incorporated.

September 16, 1983

ISSUED AS MANDATE: NOV. 15, 1983

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1266

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

versus

SAFEWAY STORES, INCORPORATED AND TEAMSTERS LOCAL 745,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion Sept. 16, 1983, 5th Cir. 1983, 714 F.2d 567)

(October 31, 1983)

Before INGRAHAM, WILLIAMS and HIGGINBOTHAM, Circuit Judges. PER CURIAM:

Appellant has specifically asked that its suggestion for rehearing en banc not be considered as including a petition for panel rehearing. In accordance with the established procedures of this Court, suggestions for rehearing en banc are considered first by the panel which decided the case as a request for panel rehearing. The specific request that we not consider panel rehearing constitutes a waiver of such a

petition. In addition, such a petition would now be out of time. Fed.R. App.P. 40(a).

On the suggestions for rehearing en banc, no member of the panel nor Judge in the regular active service of this Court has requested that the Court be polled on rehearing en banc (Fd.R.App.P. 35(b); Local Rule 35). The suggestions for rehearing en banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

CLERK NOTES: SEE FRAP AND LOCAL RULE 41 FOR STAY OF THE MANDATE

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED

42 U.S.C. § *2000e* et seq.*

DEFINITIONS

Sec. 701. For the purposes of this title—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers. (As amended by P.L. 92-261, eff. March 24, 1972)

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers. (As amended by P.L. 92-261, eff. March 24, 1972)

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for em-

*In converting sections of the Act to the statutory citations, § 701 is 42 U.S.C. § 2000e, § 702 is 42 U.S.C. § 2000e-1, § 703 is 42 U.S.C. § 2000e-2, etc.

ployees opportunities to work for an employer and includes an agent of such a person. (As amended by P.L. 92-261, eff. March 24, 1972)

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such labor organization) is (A) twenty-five or more during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization of a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection. (As amended by P.L. 92-261, eff. March 24, 1972)

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. (As amended by P.L. 92-261, eff. March 24, 1972)

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity. (As amended by P.L. 92-261, eff. March 24, 1972)

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. (Added by P.L. 92-261, eff. March 24, 1972)

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in Section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion. [Section 701(k) was added by P.L. 95-555, effective October 31, 1978, except that employers were given until April 28, 1979, to make necessary adjustments in existing fringe benefit or insurance programs. Also, employers were required to wait until October 31, 1979, or until the expiration of an applicable collective bargaining contract, before they could reduce benefits under a current plan in order to comply with the amendment.]

EXEMPTION

Sec. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. (As amended by P.L. 92-261, eff. March 24, 1972)

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

Sec. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. (As amended by P.L. 92-261, eff. March 24, 1972)

(b) It shall be an unlawful practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section. (As amended by P.L. 92-261, eff. March 24, 1972)

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, uni-

versity, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge an individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be unlawful employment practice for an employer to apply different standards of compensation, or different terms, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin; nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid to employees of such employer if such differentiation is authorized by the provisions of Section 6(d) of the Fair Labor Standards Act of 1938 as amended (29 USC 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor

organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

Sec. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title. (As amended by P.L. 92-261, eff. March 24, 1972)

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or dis-

crimination based on religion, sex or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment. (As amended by P.L. 92-261, eff. March 24, 1972)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Sec. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and, except as provided in subsection (b), shall appoint, in accordance with the provisions of title 5, United States Code, governing appointments in the competitive service, such officers, agents, attorneys, hearing examiners, and employees as he deems necessary to assist in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: Provided, That assignment, removal, and compensation of hearing examiners shall be in accordance with sections 3105, 3344,

5362, and 7521 of title 5, United States Code. (As amended by P.L. 92-261, eff. March 24, 1972)

(b) (1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 706 and 707 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this title.

(c) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum. (As amended by P.L. 92-261, eff. March 24, 1972)

(d) The Commission shall have an official seal which shall be judicially noticed.

(e) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken, and the moneys it has disbursed. It shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable. (As amended by P.L. 93-608, January 2, 1975.)

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exer-

cise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this title.

(g) The Commission shall have power —

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;

(6) to intervene in a civil action brought under section 706 by an aggrieved party against a respondent other than a government, governmental agency or political subdivision. (As amended by P.L. No. 92-261, eff. March 24, 1972)

(h) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(i) All officers, agents, attorneys and employees of the Commission, including the members of the Commission,

shall be subject to the provisions of section 9 of the act of August 2, 1939, as amended (Hatch Act), notwithstanding any exemption contained in such section.

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

Sec. 706. (a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title. (As amended by P.L. 92-261, eff. March 24, 1972)

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, include on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the 'respondent') within ten days and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local aw pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the

Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, whre applicable under subsection (c) or (d), from that date upon which the Commission is authorized to take action with respect to the charge. (As mended by P.L. 92-261, eff. Mar. 24, 1972)

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in the case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency. (As amended by P.L. 92-261, eff. March 24, 1972)

(f) (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of

any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application,

the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purpose of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United

States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure. (As amended by P.L. 92-261, eff. March 24, 1972)

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as

a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a). (As amended by P.L. 92-261, eff. March 24, 1972)

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101-115), shall not apply with respect to civil actions brought under this section. (As amended by P.L. 92-261, eff. March 24, 1972)

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section the Commission may commence proceedings to compel compliance with such order. (As amended by P.L. 92-261, eff. March 24, 1972)

(j) Any civil action brought under this section and any proceedings brought under subsection (j) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code. (As amended by P.L. 92-261, eff. March 24, 1972)

(k) In any action or proceeding under this title the court may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Sec. 707. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the

appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is

available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section. (Added by P.L. 92-261, eff. March 24, 1972)

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate. (Added by P.L. 92-261, eff. March 24, 1972)

(e) Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in sec-

tion 706 of this Act. (Added by P.L. 92-261, eff. March 24, 1972)

EFFECT OF STATE LAWS

Sec. 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

Sec. 709. (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include

provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title. (As amended by P.L. 92-261, eff. March 24, 1972)

(c) Every employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employ-

ment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply. (As amended by P.L. 92-261, eff. March 24, 1972)

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection. (As amended by P.L. 92-261, eff. March 24, 1972)

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

INVESTIGATORY POWERS

Sec. 710. For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply. (As amended by P.L. 92-261, eff. March 24, 1972)

NOTICES TO BE POSTED

Sec. 711. (a) Every employer, employment agency and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

VETERANS' PREFERENCE

Sec. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

RULES AND REGULATIONS

Sec. 713. (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act of omission

complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

FORCIBLY RESISTING THE COMMISSION OR ITS REPRESENTATIVES

Sec. 714. The provisions of sections 111 and 1114, title 18, United States Code, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. Notwithstanding the provisions of sections 111 and 1114 of title 18, United States Code, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life. (As amended by P.L. 92-261, eff. March 24, 1972)

SPECIAL STUDY BY SECRETARY OF LABOR

Sec. 715. There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commis-

sion, or their respective delegates. The Council shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section. (As amended by P.L. 92–261, eff. March 24, 1972)

EFFECTIVE DATE

Sec. 716. (a) This title shall become effective one year after the date of its enactment. (The effective date thus is July 2, 1965.)

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c) The President shall, as soon as feasible after the enactment of this title, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this title to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this title when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged

in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this title.

NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

Sec. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin. (Added by P.L. 92-261, eff. March 24, 1972)

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall —

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program

of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semi-annual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to —

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress. (Added by P.L. 92-261, eff. March 24, 1972)

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon

an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 706 (f) through (k), as applicable, shall govern civil actions brought hereunder. (Added by P.L. 92-261, eff. March 24, 1972)

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government. (Added by P.L. 92-261, eff. March 24, 1972)

SPECIAL PROVISION WITH RESPECT TO DENIAL, TERMINATION AND SUSPENSION OF GOVERNMENT CONTRACTS

Sec. 718. No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of title 5, United States Code, section 554, and the following pertinent sections: Provided, That if such

employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: Provided further, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan. (Added by P.L. 92–261, eff. March 24, 1972)